NOOR BHAYZURA DALI v. SURUHANJAYA PERKHIDMATAN AWAM MALAYSIA & ANOR

COURT OF APPEAL, PUTRAJAYA
LAU BEE LAN JCA
RAVINTHRAN PARAMAGURU JCA
MOHD SOFIAN ABD RAZAK JCA
[CIVIL APPEAL NO: W-01(A)-32-01-2018]
24 SEPTEMBER 2021

ADMINISTRATIVE LAW: *Judicial review – Certiorari and mandamus – Dismissal from service on ground of misconduct – Absence from work without permission – Whether misconduct warranted disciplinary action – Whether disciplinary process tainted with procedural impropriety – Whether action taken 'as soon as possible' by superior – Whether delay amounted to condonation – Whether failure to consider defence of condonation warranted appellate interference*

LABOUR LAW: *Dismissal – Misconduct – Absence from work without permission – Whether misconduct warranted disciplinary action – Whether period of absence triggered operation of reg. 26 of Public Officers (Conduct and Disciplinary) Regulations 1993 – Whether disciplinary process tainted with procedural impropriety – Whether action taken 'as soon as possible' by superior – Whether delay amounted to condonation – Whether failure to consider defence of condonation warranted appellate interference*

The appellant, an officer with the Administrative and Diplomatic service, upon being posted to 'Bahagian Pengurusan Pekerja Asing' in the Ministry of Home Affairs ('Ministry'), did not report to duty and was subsequently absent from work for a total of 68 days between May and December 2014. Her Head of Department ('HOD') issued a show cause letter and a directive to report for duty on 23 June 2014 which were sent *via* ordinary post. A report was sent to the Integrity Unit of the Ministry by the HOD. The appellant sent her representation which the HOD accepted and she was not reported to any disciplinary authority for action to be taken against her that year. She resumed work after her absence on various days in 2014. However, in the latter half of 2016, she was against absent from work without permission for a total of 11 days. The appellant was referred to the 'Pengerusi Lembaga Tatatertib Kumpulan Pengurusan (No 2), KDN', the disciplinary authority, to ascertain the seriousness of misconduct of an officer of her rank. In the exercise of his powers under reg. 35 of the Public Officers (Conduct and Disciplinary) Regulations 1993 ('1993 Regulations'), the Chairman ascertained that the allegation of misconduct warranted disciplinary action to be taken under reg. 37 which is with a view for dismissal or reduction in rank. Under reg. 35, the chairman of a disciplinary authority is required to refer the case to the appropriate disciplinary authority that has the power to

impose the punishment. In this case, the appellant was referred to the Public Services Commission ('PSC'). The Chairman of the PSC, having determined that there was a *prima facie* case for such action, issued a show case letter to the appellant on a charge under reg. 4(2)(g) and reg. 4(2)(i) of the 1993 Regulations, *inter alia*, that she was absent from work for a total of 79 days in 2014 and 2016. The appellant did not dispute that she was absent for many days from work but attempted to explain it. However, after its deliberations, the PSC decided to dismiss the appellant from service. Aggrieved, the appellant filed an application for judicial review, *inter alia*, for an order of *certiorari* to quash the decision of the PSC and an order of *mandamus* for her to be reinstated to her former position. The High Court dismissed the application. Hence, the appellant appealed, contending that illegality and procedural impropriety tainted the decision-making process and raised the issues in relation to: (i) failure to effect service by AR post; (ii) breach of natural justice; (iii) failure to report to disciplinary authority as soon as possible; and (iv) condonation.

Held (allowing appeal)

Per Ravinthran Paramaguru JCA delivering the judgment of the court:

(1) Regulation 26 which requires a letter to be served to the officer directing to immediately report for duty at the last known address of the officer by AR post, is applicable to a case where an officer is absent from duty without reasonable cause for seven consecutive days and cannot be traced. The appellant had been intermittently absent from work in 2014 and 2016. There was no question that the appellant could not be traced. There was no long period of absence where the officer could not be traced to trigger the operation of reg. 26. On each occasion of absence in 2014 and 2016, the appellant had returned to work. Hence, there was no merit in the argument that the letter directing the appellant to return to work was not served by AR post and resulted in procedural breach. (paras 15 & 16)

(2) The disciplinary authority is not obliged to afford an oral hearing to an officer before he is dismissed. Pertaining to the appellant's submission that the respondent did not disclose certain relevant information to her, it was not clear from the affidavit and argument for the appellant, in what manner the non-disclosure adversely affected the preparation of her answers to the charge and resulted in a breach of natural justice. In any event, before submitting her written representation, the appellant never requested for such information to be furnished to her. Hence, there was no procedural impropriety in the disciplinary process merely because the said information or documents were not furnished to the appellant. (paras 17-20)

(3) Under the 1993 Regulations, there is no time limit to commence disciplinary proceedings and delay is not fatal. Hence, delay per se was not a ground for holding that there was procedural unfairness. In this case, although the delay was not lengthy, it was nonetheless considerable as the appellant resumed work for nearly three years. The delay and the failure to consider the defence of condonation by the PSC was unexplained although it was mentioned in the two affidavits in opposition. The complaint of the appellant was not that she would have succeeded in her defence of condonation before Lembaga Tatatertib Kumpulan Pengurusan (No 1) ('Lembaga Tatatertib') or the PSC, but that it was not taken into account at all by the disciplinary authority and that this omission resulted in procedural impropriety. There was merit in this ground as the substantive disciplinary offence of the appellant was absence from work, which must be reported to the disciplinary authority 'as soon as possible' under reg. 25. Although the 1993 Regulations do not impose any time limit for the commencement of disciplinary proceedings, the omission to report an officer for being absent from work 'as soon as possible' would certainly call into question whether there was condonation of the disciplinary infraction by the HOD. (paras 27 & 30-32)

(4) The Chairman of the PSC committed procedural error in dismissing the defence of condonation peremptorily on the ground that he was not bound to consider it. Condonation was pleaded both at the disciplinary proceedings and at the judicial review proceedings. Although the term 'condonation' or 'kemaafan' was not found in the statutory statement and the affidavit in support, ample facts had been pleaded in detail and in plain language to raise it as a ground for judicial review. Evidence to support the defence of condonation was deposed in the affidavit in support of the judicial review application. Further, the letter of the HOD to the PSC in respect of the good performance of the appellant since 2014 was also mentioned in the statutory statement and the affidavit in support. Therefore, the High Court Judge erred in not considering the condonation issue on the ground that it was not pleaded and therefore the decision warranted interference. (paras 36-40)

Case(s) referred to:

Che Omar Che Mat v. Jumaah Tatatertib Perkhidmatan Awam Negeri Kelantan Bagi Kumpulan Sokongan Gred 1 Hingga 26 & Ors [2011] 1 LNS 1020 CA ***(refd)***

Chief Constable of North Wales Police v. Evans [1982] 3 All ER 141 ***(refd)***

Kerajaan Malaysia & Ors v. Tay Chai Huat [2012] 3 CLJ 577 FC ***(refd)***

Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v. Utra Badi K Perumal [2001] 2 CLJ 525 FC ***(refd)***

Musa Keran v. Public Services Commission Malaysia [1995] 1 LNS 297 HC ***(refd)***

Public Services Commission Malaysia & Anor v. Vickneswary RM Santhivelu [2008] 6 CLJ 573 FC ***(refd)***

Zulkifli Muhammad Hanafiah v. Suruhanjaya Perkhidmatan Pelajaran & Ors [2017] 3 CLJ 370 HC ***(dist)***

Legislation referred to:

Federal Constitution, art. 135(2)

Public Officers (Conduct and Discipline) Regulations 1993, regs. 4(2)(g), (i), 23, 24, 25(1), (2), 26(1), 35, 37(1), (2)(a)

Rules of Court 2012, O. 53 r. 3(2)

For the appellant - Mohd Khairul Azam Abd Aziz; M/s Azam Aziz & Co
For the respondent - Ahmad Hanir Hambaly & Istisyhad Ismail; SFCs

[Editor's note: For the High Court judgment, please see Noor Bhayzura Dali v. Suruhanjaya Perkhidmatan Awam Malaysia & Anor [2019] 1 LNS 1077 (overruled).]

Reported by S Barathi

JUDGMENT

Ravinthran Paramaguru JCA:

[1] This is an appeal against the decision of the High Court that dismissed an application for judicial review. The application was made to reinstate the appellant who had been dismissed from service.

Background Facts

[2] We shall set out the facts that were summarised by the learned High Court Judge and other relevant facts deposed in the affidavits. The appellant was an officer (Pegawai Tadbir dan Diplomatik) with the Administrative and Diplomatic Service. She joined the Administrative and Diplomatic Service on 20 December 2010. With effect from 2 May 2014, she was placed on the acting salary grade of 44 and posted to "Bahagian Pengurusan Pekerja Asing" in the Ministry of Home Affairs. But she did not report for duty on 2 May 2014. Subsequently, she was absent from work for a total of 68 days between May and December of 2014. Her head of department issued her a show cause letter and a directive to report for duty on 23 June 2014. The two letters were sent *via* ordinary post. A report was sent to the integrity unit of the Ministry of Home Affairs by the head of department. She sent her representation on 4 July 2014 to her head of department. He accepted her explanation. The appellant was not reported to any Disciplinary Authority for action to be taken against her that year. She resumed work after her absence on various days in 2014.

[3] However, in the latter half of 2016, she was again absent from work without permission for a total of 11 days. This time, the appellant's superiors appeared to have had more resolve in taking disciplinary action against her. On 10 November 2016, the appellant was referred to the "Pengerusi

Lembaga Tatatertib Kumpulan Pengurusan (No.2), KDN" which is the Disciplinary Authority to ascertain the seriousness of misconduct of an officer of her rank. In the exercise of his powers under reg. 35 of the Public Officers (Conduct and Discipline) Regulations 1993 (the 1993 Regulations), the Chairman of the "Lembaga Tatatertib Kumpulan Pengurusan (No. 2), KDN" ascertained that the allegation of misconduct warranted disciplinary action to be taken under reg. 37 which is with a view for dismissal or reduction in rank. Under reg. 35, the Chairman of a Disciplinary Authority is required to refer the case to the appropriate Disciplinary Authority that has the power to impose the punishment of reduction of rank or dismissal. It is common ground that the Disciplinary Authority that has such power in the instant case for a PTD officer is the Public Services Commission (the first respondent). In the premises, the case of the appellant was referred to the Public Services Commission. On 1 March 2017, the Chairman of the Public Services Commission determined that there was *prima facie* case for such action to be taken.

[4] A show cause letter dated 8 March 2017 was issued to the appellant on a charge under reg. 4(2)(g) and reg. 4(2)(i) of the 1993 Regulations. The charge was that she was absent from work for a total of 79 days in 2014 and 2016. The appellant submitted her letter of representation on 7 April 2017. She did not dispute the fact that she was absent for many days from work but attempted to explain it. The reasons she gave included the death of her father, her marital problems and health problems of her children. The Public Services Commission deliberated on 24 May 2017 and decided to dismiss the appellant from service. The appellant was informed of the decision by letter dated 6 June 2017.

[5] In her application for judicial review, the aggrieved appellant sought the following reliefs:

(i) An order of *certiorari* to quash the decision of the Public Services Commission (the first respondent) dated 9.6.2017, dismissing the applicant from service with effect from 24.5.2017;

(ii) A declaration that the said decision is null and void;

(iii) An order of *mandamus* to reinstate the applicant as 'Pegawai Tadbir dan Diplomatik Gred 44 (Memangku)' together with the remunerations that she was entitled to and to delete all records pertaining to the said decision; and

(iv) General and exemplary damages.

Decision Of High Court

[6] Citing the celebrated administrative law case of *Chief Constable of North Wales Police v. Evans* [1982] 3 All ER 141, the learned High Court Judge firstly directed herself that judicial review is not an appeal from a decision but a review of the manner in which a decision is made. Her Ladyship noted that the disciplinary charges against the appellant were premised on reg. 4(2)(g) and (i) which reads as follows:

> (2) An officer shall not:
>
> (g) be irresponsible;
>
> (i) be insubordinate or conduct himself in any manner which can be reasonably construed as being insubordinate;

[7] The learned High Court Judge said that the appellant was irresponsible and insubordinate or had conducted herself in a manner which can be reasonably construed as being insubordinate because she was absent from duty for a total of 79 days in the years 2014 and 2016. Her Ladyship also noted that reg. 23 of the 1993 Regulations defined absence from duty in the following terms:

> In this Part, "absence", in relation to an officer, includes a failure to be present for any length of time at a time and place where the officer is required to be present for the performance of his duties.

[8] In respect of the defence of the appellant before the Public Services Commission which made the decision to dismiss her, the learned High Court Judge noted that she did not dispute the fact of her long absence of 68 days from duty in 2014 and the 11 days in 2016. As for the reasons given by the appellant that we mentioned earlier, the learned High Court Judge cited the case of *Public Services Commission Malaysia & Anor v. Vickneswary RM Santhivelu* [2008] 6 CLJ 573 and held that it is not the function of the court hearing the judicial review application to decide whether the reasons are reasonable or acceptable. It is for Disciplinary Authority to decide whether the officer had exculpated herself from the disciplinary charge.

[9] Before the learned High Court Judge, the appellant submitted that there was procedural impropriety for the following reasons:

(i) That regs. 24, 25 and 26(1) of the 1993 Regulations were not complied;

(ii) That the appellant was not given an oral hearing;

(iii) That there was condonation.

[10] Regulations 24 to 26 are in respect of absence from work. Regulation 24 states that disciplinary action can be taken against an officer who is absent from work. Regulation 25 provides that the head of department shall report

the dates and circumstances of the absence to the appropriate Disciplinary Authority. It was argued that this provision was not complied with. The learned High Court Judge dismissed this argument because in the affidavit of the first respondent affirmed by Tuan Ruslan bin Tuan Mat on behalf of the Public Services Commission, it is stated that the head of department reported the appellant's breach of the 1993 Regulations to the Disciplinary Authority under reg. 25. In respect of reg. 26, the learned High Court Judge said that the procedure set out under it does not apply in the instant case as that provision is in respect of an employee who is absent from work and cannot be traced.

[11] In respect of the issue of oral hearing, on the authority of the Federal Court case of *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v. Utra Badi K Perumal* [2001] 2 CLJ 525, the learned High Court Judge held the requirement of fairness and natural justice is satisfied if an opportunity to make written representations is given. In respect of the issue of condonation raised by the appellant as no action was taken against her in 2014 right up to 2017, the learned High Court Judge held that it was not pleaded as a ground of review. Her Ladyship cited the case of *Musa Keran v. Public Service Commission Malaysia* [1995] 1 LNS 297; [1995] 4 MLJ 451 where the court held that the applicant cannot rely on any ground not set out in the statement under O. 53 r. 3(2) of the Rules of Court 2012. For this reason, no consideration was given to the argument that the failure to consider the defence of condonation on the part of the Public Services Commission resulted in procedural impropriety which is an accepted ground for judicial review.

Issues In The Appeal

[12] Before us, counsel for the appellant argued that illegality and procedural impropriety tainted the decision-making process. The issues can be grouped and considered under the following sub-headings:

(i) Failure to effect service by A.R. post;

(ii) Breach of natural justice;

(iii) Failure to report to Disciplinary Authority as soon as possible;

(iv) Condonation.

A.R. Post

[13] Regulation 26 of the 1993 Regulations reads as follows:

> 26(1) Where an officer is absent from duty without leave or without prior permission or without reasonable cause for seven consecutive working days and cannot be traced, his head of department shall cause a letter to be delivered personally or sent by A.R. registered post to the officer at his last-known address, directing the officer to immediately report for duty.

A (2) If, after the letter is delivered:

(a) the officer reports for duty; or

(b) the officer fails to report for duty or no news is heard from him,

his head of department shall submit a report to the appropriate B Disciplinary Authority and the Disciplinary Authority shall institute disciplinary action against the officer.

(3) If the letter cannot be delivered in person to the officer by reason of the fact that he is no longer residing at his last-known address or if the A.R. registered letter is returned undelivered, the head of department shall report the matter to the Disciplinary Authority having the jurisdiction C to impose a punishment of dismissal or reduction in rank upon the officer.

(4) The appropriate Disciplinary Authority shall, upon receiving the report referred to in subregulation (3) take steps to publish a notice in at least one daily newspaper published in the national language and having national circulation as determined by the Disciplinary Authority: D

(a) of the fact that the officer has been absent from duty and cannot be traced; and

(b) requiring the officer to report for duty within seven days from the date of such publication.

E (5) If the officer reports for duty within seven days from the date of publication of the notice referred to in subregulation (4), his head of department shall report the matter to the appropriate Disciplinary Authority and the Disciplinary Authority shall institute disciplinary proceedings against the officer.

F (6) If the officer fails to report for duty within seven days from the date of the publication of the notice referred to in subregulation (4), the officer shall be deemed to have been dismissed from the service with effect from the date he was absent from duty.

(7) The dismissal of an officer by virtue of subregulation (6) shall be notified in the *gazette*. G

[14] Counsel for the appellant submitted that reg. 26 requires that:

(1) The head of department is obliged to serve a letter to the officer in question directing to immediately report for duty.

(2) The letter must be served at the last known address of the officer H by A.R. Post.

[15] The above-mentioned requirements are stated in reg. 26 that we reproduced above. Counsel for the appellant submitted that in the instant case, no letter was sent by A.R. post directing the appellant to return to duty. In support, counsel for the appellant cited the case of *Zulkifli Muhammad* I *Hanafiah v. Suruhanjaya Perkhidmatan Pelajaran & Ors* [2017] 3 CLJ 370; [2016] MLJU 766.

[16] In our view, there is no merit in the point taken and we find that the learned High Court Judge correctly ruled that reg. 26 is not applicable in this case. Regulation 26 in plain words say that it is applicable to a case where an officer is absent from duty without reasonable cause for seven consecutive days and cannot be traced. This is the reason for the requirement to send a letter to the last-known address. In the instant case, the appellant had been intermittently absent from work in 2014 and 2016. There is no question that the appellant cannot be traced. The case of *Zulkifli Muhammad Hanafiah v. Suruhanjaya Perkhidmatan Pelajaran & Ors* (*supra*) was correctly distinguished by the court below. In that case, pending conclusion of criminal proceedings, the officer in question was ordered not to come to work for a period of four years. He was asked to return to work after the criminal case concluded in his favour. However, sometime later, he was subjected to disciplinary proceedings for being absent from work for the said four years. The High Court noted that he was not "absent from work" but suspended during the said four years and was not given his salary. That was the main reason for the decision of the court to quash the decision of the Disciplinary Authority. The court in that case also said that reg. 26 was not complied with as there was no attempt to "trace" the whereabouts of the officer. We agree with the learned High Court Judge that in this case, there was no long period of absence where the officer cannot be traced to trigger the operation of reg. 26. On each occasion of absence in 2014 and 2016, the appellant had returned to work. In the premises, the argument that the letter directing the appellant to return to work was not served by A.R. post resulted in a procedural breach has no merit.

Breach Of Natural Justice

[17] Counsel for the appellant submitted that the respondent did not give an oral hearing to the appellant to defend herself and did not disclose the following relevant information to the appellant:

(i) The name of the Chairman of the Disciplinary Board for Management Group (2);

(ii) Any document or form about the ascertainment by the disciplinary board about the type of disciplinary offence committed by the appellant; and

(iii) Proof that the board determined that there was *prima facie* in accordance with reg. 37(2)(a) before the appellant was charged.

[18] We agree with the learned High Court Judge that the Disciplinary Authority is not obliged to afford an oral hearing to an officer before he is dismissed. In *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v. Utra Badi K Perumal* (*supra*) which was cited by High Court,

the Federal Court stated the right to be heard under art. 135(2) of the Federal Constitution does not necessitate that an oral hearing must be given. The requirement of fairness is satisfied if opportunity is given to make written representations to the deciding body.

[19] In respect of the information that the appellant says that was not disclosed to her, it is not clear from the affidavit and argument of counsel in what manner the non-disclosure of the said information adversely affected the preparation of her answers to the charge and resulted in breach of natural justice. In any event, before submitting her written representation, the appellant never requested for such information to be furnished to her. In the case of *Kerajaan Malaysia & Ors v. Tay Chai Huat* [2012] 3 CLJ 577 which was cited by learned Senior Federal Counsel, Arifin Zakaria CJ said that an officer who is subject to disciplinary action cannot complain later if no request is made for oral hearing or any document before the hearing. The relevant passage is as follows:

> [3] In the present case, the respondent did not at any stage request for an oral hearing or for any document to be furnished to him. Therefore, he could not complain that such right was not afforded to him. It is for him to request for an oral hearing or for any document that he thinks could help him to prepare his answer to the charges levelled against him.

[20] Therefore, we are of the view that there was no procedural impropriety in the disciplinary process merely because the said information or documents were not furnished to the appellant.

Failure To Report To Disciplinary Authority And Condonation

[21] We propose to deal with the above-mentioned last two issues together as they appear to be related in this case. The appellant argued that her head of department did not report her absence to the Disciplinary Authority in 2014 as her explanation was accepted. She was allowed to resume work and was even given a good performance report at the end of 2015. Regulations 24 and 25(1) and (2) read as follows:

> 24 An officer's absence from duty without leave or without prior permission or without reasonable cause shall render him liable to disciplinary action.
>
> 25 (1) Where an officer is absent from duty without leave or without prior permission or without reasonable cause, his head of department shall, **as soon as possible,** report that fact together with the dates and circumstances of such absence and any further information in respect of such absence to the appropriate Disciplinary Authority.
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> (2) The appropriate Disciplinary Authority may, after considering the report of the head of department under subregulation (1), institute disciplinary action against the officer. (emphasis added)

[22] Regulation 24 provides that an officer's absence from duty shall render him or her liable to disciplinary action. The charge in the instant case cites reg. 24 and also states the absence of the appellant was tantamount to being "insubordinate and irresponsible" under reg. 4(2)(g) and 4(2)(i). Thus, the absence from duty was the gravamen of the charge against the appellant.

[23] Under reg. 25, the head of department is obliged to report the absence of an officer to the appropriate Disciplinary Authority "as soon as possible". In 2014, the head of department reported the absence of the appellant to the integrity unit. He did not report her absence to the Disciplinary Authority that had purview over the matter which is the Lembaga Tatatertib Kumpulan Pengurusan (No. 1). According to the affidavit filed by Tuan Ruslan bin Tuan Mat, the integrity unit is the secretariat for disciplinary matters in the Ministry. In para. 15.1 of his affidavit dated 10 November 2017, he deposed as follows:

> 15.1 Perenggan 19(i) Afidavit Pemohon adalah dinafikan dan saya sesungguhnya menegaskan bahawa Ketua Jabatan telah melaporkan perlanggaran tatatertib yang dilakukan oleh Pemohon di bawah Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 ("PPPA (K&T) 1993") semasa bertugas sebagai Pegawai Tadbir dan Diplomatik Gred M41 di Bahagian Pengurusan Pekerja Asing, Kementerian Dalam Negeri pada 27.08.2014 iaitu tidak hadir bertugas. Saya sesungguhnya menegaskan bahawa Pemohon adalah seorang Pegawai Awam yang tertakluk kepada PPPA (K&T) 1993. Oleh yang demikian, prosiding tatatertib terhadap Pemohon dan hukuman Buang Kerja yang dikenakan terhadap Pemohon adalah sah, teratur dan berkuatkuasa.

[24] Based on the above affidavit, the learned High Court Judge said as follows in respect of the issue whether the absence of the appellant from work was reported to the Disciplinary Authority:

> [18] In the present case, the respondents have averred that the procedure in regulation 25 had been complied with, as can be seen from paragraph 15.1 of the affidavit affirmed by Tuan Ruslan bin Tuan Mat on 10.11.2017, where the deponent had affirmed that the Ketua Jabatan had reported the applicant's breach pursuant to the 1993 Regulations to the Pihak Berkuasa Tatatertib

[25] However, a careful reading of the said paragraph would reveal that Tuan Ruslan did not specifically say that the appellant's absence was reported to the appropriate Disciplinary Authority which in this case is the Lembaga Tatatertib Kumpulan Pengurusan (No. 1). In the para. 5.1 of the same affidavit, Tuan Ruslan bin Tuan Mat only said that the head of department sent a report to the integrity unit. In the premises, no report was sent to Lembaga Tatatertib Kumpulan Pengurusan (No. 1) in 2014 or 2015.

The affidavit evidence of the appellant to that effect was not directly disputed. Tuan Ruslan bin Tuan Mat had been ambiguous and vague when he appeared to equate the sending of the said report to the integrity unit with the sending of the report to the appropriate Disciplinary Authority under reg. 25.

[26] Nonetheless, when disciplinary action was commenced at the end of 2016, a report from the integrity unit about her absence from work was received by Lembaga Tatatertib Kumpulan Pengurusan (No. 1) as stated by Tuan Ruslan bin Tuan Mat in the said affidavit. We find it necessary to emphasise that the head of department or the integrity unit did not report the absence of the appellant to the Lembaga Tatatertib Kumpulan Pengurusan (No. 1) until the end of 2016 and no show cause letter was issued to her for the following reason. The appellant has said that the issue of condonation was not considered by the Public Services Commission when it imposed the punishment of dismissal. It was also not considered by the court below on the ground that it was not pleaded in the statutory statement.

[27] We are mindful of the submission of the learned Senior Federal Counsel, that under the 1993 Regulations, there is no time limit to commence disciplinary proceedings and that delay is not fatal. The learned Senior Federal Counsel submitted two eminent authorities on this point. In *Public Services Commission Malaysia & Anor v. Vickneswary RM Santhivelu* [2008] 6 CLJ 573, a postal clerk was accused of withdrawing money from accounts of Bank Simpanan Nasional account holders. Initially, the police investigated the accusation for nearly four years. The Disciplinary Authority commenced disciplinary action only two years after the police had completed the investigation. The Federal Court held that the General Orders did not provide a time limit for commencement of disciplinary action and that delay alone does not amount to condonation. On the facts of that case, there could not have been any condonation as the officer was interdicted immediately. On the authority of the abovementioned case, in *Che Omar Che Mat v. Jumaah Tatatertib Perkhidmatan Awam Negeri Kelantan Bagi Kumpulan Sokongan Gred 1 Hingga 26 & Ors* [2011] 1 LNS 1020, it was held that delay *per se* was not a ground for holding that there was procedural unfairness. The officer in that case was accused of negligence in the performance of his duties by the Disciplinary Authority.

[28] We note that in both the above-mentioned cases, the courts considered whether there was condonation in the circumstances of the case and also said that delay alone cannot be a ground to hold there was condonation. The reason is that there is no limitation period for the institution disciplinary proceedings. We are in full agreement and are guided by this approach. In *Public Services Commission Malaysia & Anor v. Vickneswary RM Santhivelu*

(*supra*), the Federal Court approved the following passage from the judgment of the Court of Appeal in that case about delay and condonation although the decision itself was reversed:

> [30] Since case authorities say that whether there is unreasonable delay depends on the circumstances of each case, delay per se cannot be construed against the appellant. In fact the Court of Appeal said so in its judgment. At para 3 of the Court of Appeal judgment, it said:
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> > ... **It all depends on the facts of each case.** In particular it depends on a number of factors, including the nature of the charge, the length of the delay, the reasons for the delay the opportunity which the employee had to evidentially meet the accusation leveled at him. In the absence of any reasonable explanation, the longer the delay, the more difficult it would be for the disciplining body to justify the proceedings against the employee. Further, long delay may, when coupled with some other circumstances, amount to strong evidence of condonation on the part of the employer of the employee's misconduct. (emphasis added)
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> Again, later in the judgment the Court of Appeal said:
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> > ... It is well settled that the content of procedural fairness is flexible according to particular facts and circumstances and this was recognised by this Court in *Raja Abdul Malek Muzaffar Shah bin Raja Sharuzzaman v. Setiausaha Suruhanjaya Pasukan Polis & Ors* ...

[29] However, the delay in the above-mentioned case was not considered by the Federal Court as it was not pleaded. This is apparent from the following passage of the judgment of the Federal Court:

> How could a court consider reasons for the delay when delay is not pleaded? Civil proceedings are based on pleadings by which each party is given the opportunity to claim, reply or deny ...
>
> [33] In order for the court to decide whether any delay is reasonable or not, the appellant must have been given the opportunity to explain the reasons for such delay and this can only be done if such delay was pleaded and becomes an issue to be considered by the court. See *Harbhajan Singh v. Suruhanjaya Pasukan Polis Malaysia & Anor* [2002] 4 CLJ 85, *Tai Choi Yu v. Government of Malaysia & Ors* [1994] 2 CLJ 174, *Gimstern Corp (M) Sdn Bhd & Anor v. Global Insurance Co Sdn Bhd* [1987] 1 CLJ 123; [1987] CLJ (Rep) 102.

[30] The facts of the instant case call for a more careful examination before the argument of the Senior Federal Counsel that delay is immaterial is accepted. Although the delay is not lengthy in this case as in the above-mentioned cases, it is nonetheless considerable as the appellant resumed work for nearly three years. The delay and the failure to consider the defence of condonation by the Public Services Commission was unexplained although it was mentioned in the two affidavits in opposition.

[31] Tuan Ruslan Tuan Mat in his affidavit in opposition, said more than once that in 2014 the absence of the appellant was reported to the integrity unit by the head of department but failed to explain why it was not reported to the Lembaga Tatatertib Kumpulan Pengurusan (No. 1) for action to be taken. The complaint of the appellant is not that she would have succeeded in her defence of condonation before Lembaga Tatatertib Kumpulan Pengurusan (No. 1) or the Public Services Commission. She has complained it was not taken into account at all by the Disciplinary Authority and that this omission resulted in procedural impropriety. We find merit in this ground for the following reasons.

[32] The substantive disciplinary offence of the appellant in the instant case is absence from work. As we noted earlier, absence from work must be reported to the Disciplinary Authority "as soon as possible" under reg. 25. Although it is correct to say that the 1993 Regulations do not impose any time limit for commencement of disciplinary proceedings, the omission to report an officer for being absence from work "as soon as possible", would certainly call into question whether there was condonation of the disciplinary infraction by the head of department. Otherwise, the words, "as soon as possible" would be rendered otiose and meaningless.

[33] In the instant case, the appellant had deposed unchallenged evidence of condonation by her head of department and his recommendation for leniency. As we said earlier, the head of department only sent a report to the integrity unit and not to the Lembaga Tatatertib Kumpulan Pengurusan (No. 1). The appellant's explanation was accepted by the head of department and she was allowed to continue work in 2014. In fact, nothing much happened after that until the end of 2016 when she was absent again for 11 days which resulted in her salary for seven days being deducted. In the interim, she was given a good performance report (above 90%) for the years 2014, 2015 and 2016 by her head of department. She was even deemed suitable for promotion.

[34] Under reg. 37(1) which sets out the procedure to be followed by the Disciplinary Authority in cases which will lead to dismissal or reduction in rank, the Chairman of the appropriate Disciplinary Authority is required to consider "all available information". The provision reads as follows:

> (1) If it is determined under subregulation 35(2) that the disciplinary offence complained of against an officer is of a nature that warrants a punishment of dismissal or reduction in rank, the Chairman of the appropriate Disciplinary Authority to which the case is referred shall consider all the available information.

[35] The Public Services Commission which is the Disciplinary Authority that was entitled to impose the punishment of dismissal was certainly not obliged to hold that the appellant had exculpated herself of the charge in question on the ground of condonation or that the said ground had mitigated the offence. The assessment of evidence whether an officer had committed a disciplinary offence or whether any punishment is appropriate is eminently a matter within the purview of the Disciplinary Authority and should not warrant interference by the court. However, the Disciplinary Authority is obliged to follow the prescribed procedure. In the instant case, the defence of condonation appears to have been totally disregarded as the Chairman of the Public Services Commission said that "under the law" he was not bound to consider it. In the affidavit in reply dated 6 November 2017, the Chairman of Public Services Commission deposed as follows:

> 16. Perenggan 16 dan 17 Afidavit Pemohon adalah diakui setakat bahawa Ketua Jabatan Pemohon telah mengemukakan representasi Pemohon berserta ulasan kepada Responden Pertama. Walau bagaimanapun, Responden Pertama menegaskan bahawa tiada keperluan di sisi undang-undang untuk Responden Pertama mempertimbangkan ulasan Ketua Jabatan dan Responden Pertama menegaskan bahawa kuasa untuk memutuskan hukuman bagi perlanggaran tatatertib Pemohon adalah terletak pada Responden Pertama dan bukannya Ketua Jabatan Pemohon.

[36] The learned Senior Federal Counsel submitted that condonation was not pleaded in this case and her argument was accepted by the learned High Court Judge. We are of the view that the learned High Court Judge erred in accepting this argument. We find that the condonation was pleaded both at the disciplinary pleadings and at the judicial review proceedings. In respect of the plea at the disciplinary proceedings, nothing more need to be said as we have referred to the affidavit evidence of the appellant. As for the instant judicial review, although the term "condonation" or "kemaafan" is not found in the statutory statement and the affidavit in support, ample facts have been pleaded in detail and in plain language to raise this as a ground for judicial review. In paras. (e) and (f) of the statutory statement, the appellant pleaded facts to support the defence of condonation as follows:

> d) Pemohon telah menerima surat Amaran Pertama Arahan Hadir ke Pejabat dan Surat Tunjuk Sebab Tidak Hadir Bertugas no ruj: KDN PA:03/944/1Jld21(20) bertarikh 23 Jun 2014 yang telah dihantar melalui pos biasa bukan melalui pos berdaftar.
>
> e) Pemohon telah melalui surat representasi bertarikh 4 Julai 2014, menjawab tunjuk sebab berkenaan.
>
> f) **Ketua Jabatan Pemohon telah menerima penjelasan Pemohon melalui surat representasi berkenaan dan tidak merujukkan pemohon kepada mana-mana jawatankuasa tatatertib.**
>
> (emphasis added)

[37] Evidence to support the defence of condonation was deposed in the affidavit in support of the judicial review application which is as follows:

> 13. Saya selanjutnya menyatakan bahawa selepas Ketua Jabatan saya menerima surat penjelasan saya berkaitan alasan-alasan tidak hadir bertugas, Ketua Jabatan saya dengan kuasa budi bicara mereka telah mempertimbangkan alasan-alasan saya dan memutuskan untuk tidak merujukkan saya kepada mana-mana pihak berkuasa tatatertib dan saya telah hadir bertugas seperti biasa bermula 22 Ogos 2014 tanpa sebarang masalah.

[38] Furthermore, the letter of the head of department of the appellant to the Public Services Commission in respect of the good performance of the appellant since 2014 was also mentioned in the statutory statement and the affidavit in support.

[39] In the premises, we are of the view that the learned High Court Judge erred in not considering the condonation issue on the ground that it was not pleaded and therefore, the decision warrants interference.

Conclusion

[40] As we said earlier, the Chairman of the Public Services Commission is obliged to consider all "available information" under reg. 35. The information in respect of the condonation defence was placed before him by the appellant. It is certainly relevant in view of the delay of three years between the time the appellant was absent for 68 days in 2014 and the time she was asked to show cause in early 2017. It would have been otherwise if the defence was duly considered by Public Services Commission and rejected as insufficient to exculpate her from the charge in question. However, we repeat that the defence was dismissed without being considered at all. For all the above reasons, we are of the view that the Chairman of the Public Services Commission committed procedural error in dismissing the defence of condonation peremptorily on the ground that he was not "bound" to consider it. In the premises, we shall allow the appeal and grant prayers (1), 2(i), 3(i),(ii) and (iii). We grant costs of RM10,000 to the appellant here and below.